

9-18-2013

Spirit Ridge Mineral Springs v. Franklin County Appellant's Reply Brief Dckt. 40865

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/
idaho_supreme_court_record_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

Recommended Citation

"Spirit Ridge Mineral Springs v. Franklin County Appellant's Reply Brief Dckt. 40865" (2013). *Idaho Supreme Court Records & Briefs*. 4618.
https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/4618

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact annablaine@uidaho.edu.

IN THE SUPREME COURT OF THE STATE OF IDAHO

SPIRIT RIDGE MINERAL SPRINGS
LLC, a Wyoming Limited Liability
Company,

Plaintiffs/Respondents,

Supreme Court
Case No. 40865-2013

vs.

FRANKLIN COUNTY,

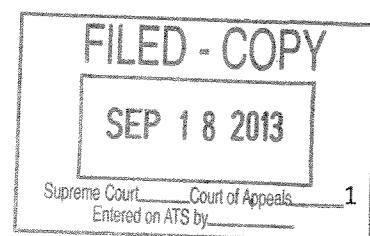
Defendants/Appellants.

APPELLANTS' REPLY TO BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
FOR FRANKLIN COUNTY
THE HONORABLE JUDGE BROWN, PRESIDING

Blake S. Atkin
ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Attorney for Appellants

Vic A. Pearson
FRANKLIN COUNTY
PROSECUTING ATTORNEY
39 West Oneida
Preston, Idaho 83263
Attorney for Respondents



IN THE SUPREME COURT OF THE STATE OF IDAHO

SPIRIT RIDGE MINERAL SPRINGS
LLC, a Wyoming Limited Liability
Company,

Plaintiffs/Respondents,

**Supreme Court
Case No. 40865-2013**

vs.

FRANKLIN COUNTY,

Defendants/Appellants.

APPELLANTS' REPLY TO BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT
FOR FRANKLIN COUNTY
THE HONORABLE JUDGE BROWN, PRESIDING

Blake S. Atkin
ATKIN LAW OFFICES, P.C.
837 South 500 West, Suite 200
Bountiful, Utah 84010
Telephone: (801) 533-0300
Facsimile: (801) 533-0380
Attorney for Appellants

Vic A. Pearson
FRANKLIN COUNTY
PROSECUTING ATTORNEY
39 West Oneida
Preston, Idaho 83263
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF CONTENTS.....	2
TABLE OF CASES AND AUTHORITIES	3
INTRODUCTION	4
ARGUMENT	4
I. The District Court Found that the Franklin County Gun Range is a Nuisance	4
II. Burden to Prove Abatement	8
CONCLUSION	10

TABLE OF CASES AND AUTHORITIES

Cases

<i>City of Marlin v. Criswell</i> , Tex.Civ.App., 293 S.W. 910 (1927).....	5
<i>Cobbley v. City of Challis</i> , 143 Idaho 130, 134, 139 P.3d 732, 736 (2006)	9
<i>Larsen v. Village of Lava Hot Springs</i> , 88 Idaho 64, 73, 396 P.2d 471, 476 (1964).....	5
<i>Lyon v. Cascade Commodities Corp.</i> 94 Idaho 714, 496 P.2d 951 (1972).....	9
<i>Nelson v. Marshall</i> , 94 Idaho 726, 497 P.2d 47 (1972)	6
<i>Olsen v. Hawkins</i> , 90 Idaho 28, 408 P.2d 462 (1965)	6, 8
<i>Rogers v. City of Abilene</i> , 704 S.W. 2d 145, 147 (Tex.App. Eastland 1986).....	9
<i>State v. Maguire</i> , 169 P. 175, 178 (Idaho, 1917).....	5
<i>State v. Sawtooth Men's Club</i> , 85 P.2d 695, 698 (1938).....	5

Statutes

I.C. § 52-101	4
---------------------	---

INTRODUCTION

Franklin County has failed to oppose the issues on appeal. The District Court's finding that no evidence of a continuing nuisance had been presented since 2008 was clearly erroneous and should be overturned. There are at least two pieces of evidence that the District Court ignored when it entered its order incorrectly described as a "directed verdict."¹ In the first instance, a Franklin County Sheriff's Deputy explained that the Sheriff's Department standard practice was to close the public range to avoid injury to officers from ricochets originating in the public range. In the second instance the Court ignored photographic evidence that bullets fired from the installed benches (installed after 2008) have cleared the berms and left the range. The Brief of Respondent has failed to oppose, or even address, the issues on appeal. The erroneous nature of the District Court's order thus faces no obstacle to review and reversal.

ARGUMENT

I. The District Court Found that the Franklin County Gun Range is a Nuisance

Idaho has established by statute that a nuisance is:

“Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.”

¹ In an action tried by the court without a jury, the appropriate motion would have been made pursuant to I.R.C.P. 41(b) seeking involuntary dismissal of Plaintiff's claim for failure to show a right to relief. Notwithstanding the

I.C. § 52-101. In its Respondent's Brief, Franklin County has stated that "to constitute a nuisance, there must be a continuing offense or recurrent acts." Respondent's Brief at 4. A careful review of the authority cited for this proposition reveals that this definition is not applicable to the instant case. *State v. Sawtooth Men's Club*, 85 P.2d 695, 698 (Idaho 1938) (specific to the definition of nuisance "within the meaning of the (Idaho Liquor Control Act). In fact, the second case Franklin County cites for this proposition contemplates a nuisance that was maintained between two specific dates, an idea that directly contravenes the statements made by the District Court regarding the necessity of proving a continuing nuisance. *State v. Maguire*, 169 P. 175, 178 (Idaho 1917). The District Court's dismissal of the case based on a failure to provide evidence of a nuisance continuing beyond 2008, echoed and emphasized by Franklin County in its Brief of Respondent, is not supported by the law. Based on Franklin County's brief and the authorities cited, the District Court's dismissal of Spirit Ridge's claims based on a failure to provide evidence of the nuisance beyond 2008 is incorrect as a matter of law and should be overturned on that basis alone.

A. District Court Disregarded Competent Evidence

In order to obtain an injunction against, or the abatement of, an alleged nuisance, the complaining party must show a clear case supporting his right to relief. *Larsen v. Village of Lava Hot Springs*, 88 Idaho 64, 73, 396 P.2d 471, 476 (1964) citing *City of Marlin v. Criswell*, Tex.Civ.App., 293 S.W. 910 (1927). Spirit Ridge has shown a clear case supporting its right to relief.

The Court failed to act within the bounds of its discretion when it ignored several facts in the record and, while it may have applied the correct legal standard, it did not apply that standard to all of the relevant facts. In ruling upon motions made under Rule 41(b) of the Idaho Rules of Civil Procedure, the trial court may weigh the evidence, *Nelson v. Marshall*, 94 Idaho 726, 497 P.2d 47 (1972); however, it *may not disregard testimony* which was neither contradicted, impeached nor inherently improbable. *Olsen v. Hawkins*, 90 Idaho 28, 408 P.2d 462 (1965) (*emphasis added*). The record reveals that, starting with the original purchase of the land surrounding the gun range in 1999, bullets have escaped the gun range and entered the Spirit Ridge property on many occasions. Spirit Ridge has provided witness testimony that bullets fired from the gun range have landed on Mr. Ridge's property. This testimony not been contradicted, impeached and is not inherently improbable, *Id.* Indeed, the Court candidly admitted: "It's undisputed that on occasion slugs from firearms that have been discharged on the firing range can find their way outside the berms and outside the firing range and ultimately onto Mr. Ridge's property." Reporter's Transcript on Appeal ("Transcript") at 426-427.

Notwithstanding the Trial Court's finding that there was "ample evidence that ricochet bullets found their way onto the plaintiff's property." Transcript at 382, 393. The District Court found that "There has been no discussion, no testimony, regarding any intentional accidents since 2008 regarding these issues" and "There has been absolutely no evidence of an ongoing problem with respect to individuals who are frequenting the gun range, the Franklin County gun range, violating the rules, violating the law, committing intentional negligent acts that have

caused harm to Mr. Ridge, to Mr. Ridge's property, or to the quiet enjoyment of his property.”

Transcript at 428-429. This is demonstrably false.

Mr. Ridge had been run off his property by the Franklin County gun range by the time of trial. The District Court apparently expected Mr. Ridge to risk life and limb to remain and catalogue continuing offenses after already having suffered for years. Even assuming there is a legal requirement that a nuisance persist up to and then beyond the date of a trial to justify abating a nuisance, the District Court's statements are factually incorrect because such evidence was provided to and then ignored by the Court, even though it was refuted.

i. Franklin County Sheriff's Department Safety Protocols

The Franklin County Sheriff's department uses a portion of the Franklin County gun range for its training exercises. Transcript at 318. When members of the department are training, they block the range off from the public and put a sign by the road advising the public that the range is closed for the duration of the training because ricochets have been known to escape the public range. Transcript at 317-318. It is clear from the language used by Deputy Jensen that this practice persisted at least until the time of the trial. He testified: “When we go out to the range,” and “we actually block off the range from the public in case there's a ricochet that comes from one of the other two longer ranges.” Transcript at 317-318. Both of these statements are in the present tense indicating that these practices were standard, at least up until the time of the trial in 2011. The District Court completely ignored this evidence from a disinterested party that bullets continued to exit the Franklin County gun range after 2008.

ii. Physical Evidence that Bullets have and will Continue to Escape the Berms

Photographic evidence was supplied to the Court that showed the firing tables at the gun range and their relationship to posted targets within the gun range. Exhibits 16, Transcript at 45 line 16-20; Exhibit 17, Transcript at 45-47; Exhibit 18, Transcript at 229-230. These pictures show the tops of the target stands being torn up by gun fire being shot from the tables. Exhibit 16, Transcript at 45 line 16-20. The tables were installed in about 2010. Transcript at 111.

On redirect, Larry Biggs, ostensibly the manager of the gun range, admitted that when firing from the benches at a posted target, it was possible for bullets to escape the berms. Transcript at 378-379. With nowhere to go but down, any such escapees would fall onto Spirit Ridge property potentially causing damage to property and life.

It was inappropriate for this evidence to be ignored. None of the cited evidence was contradicted, impeached nor inherently improbable and the court therefore may not disregard it. *Olsen v. Hawkins*, 90 Idaho 28, 408 P.2d 462 (1965). Mr. Ridge only seeks to quietly enjoy his property, something he cannot do with bullets raining down upon his head. The trial court abused its discretion when it erroneously dismissed this case without considering this uncontradicted and very probable evidence. On appeal, Franklin County has continued to ignore this evidence.

II. Burden to Prove Abatement

Spirit Ridge established that the gun range was a nuisance while Mr. Ridge was living on the property. The Trial Court acknowledged this fact: “It’s undisputed that on occasion slugs from firearms that have been discharged on the firing range can find their way outside the berms and outside the firing range and ultimately onto Mr. Ridge’s property.” Transcript at 426-427. If

slugs from firearms discharged on the firing range can find their way to Mr. Ridge's property, then people and other property present there are not safe. Bullets can be "injurious to health" and, as demonstrated by Mr. Ridge's departure, "obstruct the free use of his property." The gun range is a nuisance and that nuisance must be abated.

This Court has stated that "for one to be held liable for a nuisance, he, she, or it, must control or manage or otherwise have some relationship to the offensive instrumentality or behavior that would allow the law to say the defendant must stop causing it and/or pay damages for it." *Cobbley v. City of Challis*, 143 Idaho 130, 134, 139 P.3d 732, 736 (2006). Franklin County owns the gun range at issue and has hired individuals to manage the gun range and thus has the requisite relationship to the gun range. Transcript at 205, 208. As owner/manager of the gun range, Franklin County is responsible for abating the nuisance represented by the range and the bullets emanating therefrom. When the District Court acknowledged that the gun range was a nuisance, the burden of proving that the nuisance had been abated fell upon Franklin County.

Once a nuisance has been established, the burden shifts to the operators of the nuisance to show that they have taken steps to abate the nuisance. *Rogers v. City of Abilene*, 704 S.W. 2d 145, 147 (Tex.App. Eastland 1986) ("The burden was not on the [plaintiff] to show that the nuisance continued. The burden to establish that it had been abated was on the owner to raise a fact issue on the affirmative defense of voluntary abatement of the nuisance.") See, also, *Lyon v. Cascade Commodities Corp.* 94 Idaho 714, 496 P.2d 951 (Idaho 1972). ("Thus, the appellants would have an opportunity to demonstrate whether the new equipment installed in the plant effectively eliminated the cause of the odors emanating from the plant. The district court has

discretion to afford the appellants this opportunity, either upon application to modify the temporary injunction or upon proper showing prior to hearing of the case on its merits.") The District Court and Franklin County both rely on the assumption that, in order to recover on this action, Spirit Ridge must show that the nuisance continued beyond the described 2008 incidents. Even though this position is not supported by the law, Spirit Ridge provided uncontradicted and highly probable evidence that the nuisance has persisted.

CONCLUSION

The District Court admitted that Spirit Ridge showed that the Franklin County gun range is a nuisance, but denied the requested relief based on an unsubstantiated belief that a nuisance must persist indefinitely before relief can be granted. Even if evidence of the persistence of the nuisance to some unspecified date were required under the law, Spirit Ridge supplied evidence that the nuisance did persist but that evidence was ignored by the Court. In its Respondent's Brief, Franklin County relies on the same erroneous beliefs as the Court in rehashing its arguments without addressing the issues on appeal. The Franklin County gun range is a nuisance that must be abated. Otherwise, the constitutionally protected property rights of an Idaho citizen will continue to be trampled by the county because Mr. Ridge will never be able to safely enjoy his property.

Dated this 17th day of September, 2013.

ATKIN LAW OFFICES, P. C.

A handwritten signature in black ink, appearing to read "Blake S. Atkin", written over a horizontal line.

Blake S. Atkin
Attorney for Plaintiff/Appellants
Spirit Ridge Mineral Springs LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of September, 2013, a true and correct copy of the foregoing **APPELLANTS' REPLY TO BRIEF OF RESPONDENT** was served upon each of the following individuals by causing the same to be delivered by the method and to the address indicated below:

Vic A. Pearson
FRANKLIN COUNTY
PROSECUTING ATTORNEY
39 West Oneida
Preston, Idaho 83263
Attorney for Respondents

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

Clerk of the Idaho Supreme Court and
Court of Appeals
451 W. State St.
P.O. Box 83720
Boise, Idaho 83720-0101

☐ U.S. Mail
☐ Hand Delivery
☒ Overnight Mail
☐ Facsimile

Jennifer Mariscal